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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

IN RE SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, AND GRANT WOODS, ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

PETITIONERS,

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE HONORABLE WILLIAM C. CANBY, JR., AND HARRY PREGERSON, CIRCUIT JUDGES, AND STEPHEN V. WILSON, DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

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QUESTION PRESENTED FOR REVIEW

Whether this Court should issue a writ of mandamus to the United States Court of Appeals for the Ninth Circuit to compel that court to resolve the claims remaining undecided after this Court's opinion in *Lewis v. Jeffers*,[1] when the circuit court has ignored this Court's command in *In Re Blodgette*[2] to "take all steps necessary to ensure a prompt resolution" of this capital case and has considered Jeffers' appeal for nearly 3 years without deciding it?

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1. 110 S. Ct. 3092, 111 L. Ed. 2d 602 (1990).

2. 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992).

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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IN RE SAMUEL A. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, AND GRANT WOODS, ATTORNEY GENERAL FOR THE STATE OF ARIZONA,

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PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE HONORABLE WILLIAM C. CANBY, JR., AND HARRY PREGERSON, CIRCUIT JUDGES, AND STEPHEN V. WILSON, DISTRICT JUDGE FOR THE CENTRAL DISTRICT OF CALIFORNIA

Petitioners respectfully request that, pursuant to 28 U.S.C. § 1651(a), the All Writs Act, this Court issue a Writ of Mandamus in *Jeffers v. Lewis*, No. 86-1840, to compel the United States Court of Appeals for the Ninth Circuit, the Honorable William C. Canby, Jr., and Harry Pregerson, Circuit Judges, and Stephen V. Wilson, District Judge of the Central District of California, to decide, within a time certain, the claims remaining on appeal after this Court's opinion in *Lewis v. Jeffers*.

I. ORDERS AND OPINIONS BELOW

On June 27, **1990**, this Court remanded this case to the United States Court of Appeals for the Ninth Circuit for proceeding consistent with the opinion in *Lewis v. Jeffers*, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). On August 31, **1992**, a divided panel of the Ninth Circuit issued an opinion vacating the inmate's death sentence on an issue not raised by the inmate in the *habeas corpus* petition or in the briefs. *Jeffers v. Lewis*, 974 F.2d 1075 (9th Cir. 1992). On September 12, 1992, the State of Arizona filed a motion for rehearing, with a suggestion for rehearing en banc. (Appendix A.) On March 19, 1993, the State filed its second request for ruling on the motion for rehearing. (Appendix B.) On March 31, 1993, the clerk of the court notified counsel that the panel would rule on the motion by "the end of April." (Appendix C.) As of the date of the filing of this petition, June 18, 1993, the panel had not issued a ruling on the motion for rehearing.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1651(a) and United States Supreme Court Rule 20.1. This Court has jurisdiction over any decision of the Court of Appeals on Jeffers' appeal pursuant to 28 U.S.C. § 1254.

III. STATEMENT OF THE CASE

Jeffers, an inmate in the Arizona State Prison sentenced to death, filed a petition for writ of habeas corpus in the United States District Court in **December 1983**. On **February 4, 1986**, the district court dismissed the petition. *Jeffers v. Ricketts*, 627 F. Supp. 1334 (D. Ariz. 1986). In his opening brief in the United States Court of Appeals for the Ninth Circuit, Jeffers raised five claims that his convictions were improper, and eight

claims that his death sentence was improperly imposed. On November 9, 1987, a three member panel of the circuit court, composed of Circuit Court Judges William C. Canby, Jr., and Harry Pregerson, and District Court Judge Stephen V. Wilson, sitting by designation, rejected all of Jeffers' attacks on his conviction. *Jeffers v. Ricketts*, 832 F.2d 476, 479–81 (9th Cir. 1987). The panel also rejected Jeffers' claim that he was denied an impartial sentencing tribunal. *Id.* at 481–82. However, two members of the panel vacated Jeffers' death sentence on the ground that the "especially heinous or depraved" aggravating circumstance found by the state court to exist in his case, while sufficiently narrow, could not be constitutionally applied to Jeffers "without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." *Id.* at 486. The panel declined to consider Jeffers' remaining sentencing-related claims. *Id.* at 486. On April 14, 1989, the circuit court denied the State of Arizona's motion for rehearing and suggestion for rehearing en banc.

The State then filed a petition for writ of certiorari asking this Court to review the circuit court's decision that the "especially heinous or depraved" circumstance could not be constitutionally applied to Jeffers. On **October 10, 1989**, this Court granted the State's petition, and on **June 27, 1990**, concluded that the state supreme court had adopted a sufficiently narrow construction of the "especially heinous or depraved" circumstance, and that the circumstance had been constitutionally applied in Jeffers' case. *Lewis v. Jeffers*, 110 S. Ct. 3092, 3104, 111 L. Ed. 2d 606, 624–25 (1990). This Court vacated the circuit court's judgment and remanded the case to that court for proceedings consistent with its opinion. *Id.*

On **October 1, 1990**, the circuit court ordered supplemental briefs on the sentencing-related claims that Jeffers had previously raised in the circuit

court that were not resolved by the circuit court's original decision nor by this Court's opinion in *Lewis v. Jeffers*. (Appendix D.) The issues remaining for consideration were as follows: (1) whether the trial court considered and made appropriate findings regarding all the mitigating circumstances that Jeffers proffered; (2) whether the Arizona Supreme Court's modification of the trial court's findings regarding aggravating circumstances required resentencing; (3) whether Jeffers had an "equal protection" right to a jury determination of aggravating and mitigating circumstances; (4) whether Arizona's capital sentencing scheme is unconstitutional because the prosecutor does not have to make a separate showing that the death sentence is appropriate; (5) whether the district court correctly refused to hold an evidentiary hearing on Jeffers' claim that the Arizona capital sentencing scheme was discriminatory; (6) whether the offer of pretrial plea agreements precluded the imposition of the death sentence. The State submitted its supplemental answering brief on **January 28, 1991**. The circuit court heard oral argument on the claims on **July 24, 1991**.

On **January 29, 1992**, Petitioners filed a Request for Ruling in the circuit court, reminding that court of this Court's command to promptly rule on capital cases before it. (Appendix E.) The circuit court took no action regarding the State's request or Jeffers' appeal, so on August 3, 1992, the State filed a petition for writ of mandamus with this Court. *In re Lewis*, No. 92-289. On August 31, 1993, while the State's mandamus petition was pending in this Court, a divided panel issued an opinion, setting aside Jeffers' death sentence on an issue not raised by the inmate in state court, before the district court, or in the briefs filed with the panel. *Jeffers v. Lewis*, 974 F.2d 1075 (9th Cir. 1992). On September 14, 1992, the State filed pursuant to Rules 35 and 40 of the Federal Rules of

Appellate Procedure, a petition for rehearing with suggestion for rehearing en banc. (Appendix A.) After waiting 60 days, the State filed its first request for ruling. (Appendix F.) In response, the panel ordered Jeffers to file a response to the State's motion. On December 15, 1992, the inmate filed his response to the petition for rehearing/suggestion for rehearing en banc. The State waited for over 90 days after the response was filed, and again filed a request for ruling. (Appendix B.) On March 31, 1993, the clerk of the court notified counsel that the panel would rule on the motion by "the end of April." (Appendix C.) As of the date of the filing of this petition, June 18, 1993, the panel had not issued a ruling on the motion for rehearing.

IV. SUMMARY OF ARGUMENT

Because the federal courts have granted a stay of execution in this case, they have a duty to take all steps necessary to ensure a prompt resolution of the matter. Mandamus is appropriate to compel an inferior court to exercise its authority when it has a duty to do so. On June 27, 1990, this Court vacated the Ninth Circuit's decision and remanded the case for that court to resolve the remaining issues. As of June 1993 over 3 years later, that court has still not done so. Because the Ninth Circuit has failed in its duty to take all steps necessary to ensure a prompt resolution of the matter, mandamus is appropriate for this Court to compel the Ninth Circuit to resolve the remaining issues as soon as possible.

V. REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT COMPELLING IT TO DECIDE JEFFERS' APPEAL WITHIN A TIME CERTAIN BECAUSE THAT COURT HAS IGNORED THIS COURT'S COMMAND TO RESOLVE CAPITAL CASES PROMPTLY.

Because this is a capital case and because the Ninth Circuit Court of Appeals has not ruled in a sufficiently prompt manner, this Court should issue a Writ of Mandamus to the Ninth Circuit to require it to rule on Jeffers' appeal within a time certain. Mandamus is appropriate to compel an inferior court to exercise its authority when it has a duty to do so. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). Although the time taken to issue a decision is within a court's discretion, a party may obtain a Writ of Mandamus when it shows that the court has "clearly abused its discretion." *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84–85 (1970); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257 (1957).

The circuit court has clearly abused its discretion in delaying issuing a decision in this capital case. This Court explicitly held in *In re Blodgette*, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992), that such delay would not be tolerated:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty *to take all steps necessary to ensure a prompt resolution of the matter*, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

112 S. Ct. at 676, 116 L. Ed. 2d at 676 (emphasis added). The circuit court has not "taken all steps necessary to ensure a prompt resolution" of Jeffers' appeal. Three years have passed since this Court remanded Jeffers' appeal to the circuit court with no final resolution. Since **September 14,**

1992, 9 months ago, the circuit court has had the State's motion for rehearing presenting the law and its application to the issues remaining to be decided. On **November 16, 1992 and March 19, 1993**, the State of Arizona notified the circuit court by motion of this Court's command in *Blodgette*, and requested that the circuit court promptly rule on the remaining issues. (Appendix B & F.) The circuit court did not act upon Arizona's motion, and still has not issued a decision. The circuit court is ignoring this Court's direction in *Blodgette*, and a Writ of Mandamus to that court is essential to ensure compliance with the requirement in *Blodgette*.

The circuit court's dilatory inaction harms this Court, the State of Arizona, and the American system of justice. This Court is harmed because the circuit court's inaction deprives this Court of its power to review the *Jeffers* case by way of certiorari. This Court has stated the following regarding a lower court's efforts to defeat a superior court's appellate review:

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert Fire Ins. Co., 437 U.S. at 661–62 (quoting *Knickerbocker Ins. Co. v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1872)). This Court is deprived of its appellate jurisdiction as long as the circuit delays deciding Jeffers' appeal.

The State of Arizona is also harmed because it has been deprived of its sovereign power to enforce its criminal laws. This Court recognized this harm in *Blodgette*:

> None of the reasons offered in the response dispels our concern that the State of Washington has sustained severe

> prejudice by the two-and-a-half year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [*McCleskey v. Zant*] when discussing the importance of finality in the context of federal habeas corpus proceedings.

112 S. Ct. at 676, 116 L. Ed. 2d at 674 (citation omitted). As with Washington in *Blodgette*, Arizona has suffered a severe diminution of its sovereign power:

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but *the power of a state to pass laws means little if the state cannot enforce them.*

McCleskey v. Zant, 111 S. Ct. 1454, 1469, 113 L. Ed. 2d 517, 543 (1991) (emphasis added). The diminution of sovereignty is even greater for Arizona in this case, because the federal courts have prevented Arizona from enforcing its criminal laws against Jeffers since **December 1983**, almost 10 years. A result not anticipated when this Court remanded the matter 3 years ago.

Finally, the American judicial system is harmed by the circuit court's inaction. The circuit court's apparent endless search for epistemological certainty on issues before issuing a decision on an appeal damages the very justice the circuit court seeks:

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McCleskey v. Zant, 111 S. Ct. at 1469, 113 L. Ed. 2d at 543, *quoting* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452–53 (1963). A court immobilized in

its search for justice provides none. The circuit court's duty is not to achieve absolute certainty on an issue before it, but simply, after due consideration, to decide it:

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.*

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 403 (1821) (emphasis added). Ever-delayed justice is no justice at all.

The Ninth Circuit Court of Appeals has ignored this Court's plain command to promptly resolve capital cases such as Jeffers' appeal. Such inaction, whether unintended or deliberate, harms this Court, Arizona, and the American system of justice. Arizona has attempted to bring this unreasonable delay to the circuit court's attention, but to no avail. Arizona has no other available course of action or remedy but to seek a Writ of Mandamus from this Court to the circuit court. Therefore, the State of Arizona respectfully request that this Court issue a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit to compel that court to issue a decision in Jeffers' appeal within a time certain.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court issue a Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit, the Honorable Circuit Judges William C. Canby, Jr., and Harry Pregerson, and District Court Judge Stephen V. Wilson.

Respectfully submitted,

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[Dated September 12, 1992]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 86-1840

JIMMY WAYNE JEFFERS,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
Petitioner-Appellant,	)	COURT FOR THE DISTRICT
	)	OF ARIZONA,
-vs-	)	NO. CIV-85-945-TUC-ACM
	)	
SAMUEL A. LEWIS, et al.,	)	PETITION FOR REHEARING
	)	WITH SUGGESTION FOR
Respondents-Appellees.	)	REHEARING EN BANC
	)	

Respondents-Appellees, pursuant to Rules 35 and 40, Federal Rules of Appellate Procedure, ask this Court to rehear its decision filed August 31, 1992, and suggest that a rehearing en banc would be appropriate. Reasons in support of this request are set forth in the following Memorandum of Points and Authorities.

DATED this 12th day of September, 1992.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
Chief Counsel

Attorneys for RESPONDENTS-APPELLEES

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Undersigned counsel believes that a rehearing is appropriate because in its decision the majority overlooked material points of fact or law in its analysis of the review performed by the Arizona courts and materially misrepresented the position taken by Arizona Attorney General in the oral argument before this Court. Undersigned counsel also believes that this Court failed to consider Clark v. Ricketts, 958 F.2d 851 (9th Cir. 1991), a case decided after the submission of this case and in conflict with the majority's decision.

Undersigned counsel believes that a hearing en banc is appropriate because of the conflict with Clark v. Ricketts, the exceptional importance of the question regarding the proper presumption to be afforded state court's findings, and the conflict existing with the majority opinion.

II. Argument

A. The majority opinion directly conflicts with another panel's decision in **Clark v. Ricketts** and abrogates the presumption that state-court convictions and sentences are presumed correct unless clearly shown otherwise.

The majority opinion states that it cannot allow Jeffers' penalty to stand because the trial court failed to "consider adequately" the mitigating evidence, and Arizona Supreme Court failed in "carefully reweighing" the mitigation and aggravation in its independent review. Slip op. at 8, 16. Both conclusions conflict with Clark v. Ricketts. The majority opinion reached its conclusion regarding the trial court error by stating:

> Because the sentencing court failed to discuss the evidence of duress, provocation, intoxication, and heroin addiction as nonstatutory mitigating circumstances, and failed to discuss the sodium amytal evidence at all, the record does not permit this

> court to conclude that the evidence was considered adequately. "We are not permitted to presume that because evidence was admitted before the factfinder, it was necessarily given consideration." Smith, 914 F.2d at 1166. Because there is a risk that mitigating evidence in this case was not fully considered, Jeffers's sentence of death cannot stand. Smith, 914 F.2d at 1167-69.

Slip op. at 8. This very contention was rejected by a unanimous panel in Clark:

> The due process clause does not require that the sentencing court exhaustively document its analysis of each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant. See, e.g., Parker [v. Dugger], 111 S.Ct. [731], 736 (statement by the sentencing court that it considered all mitigating evidence adequate).

958 F.2d at 858 (emphasis added, footnote omitted). In fact, the Clark opinion rejects the very portion of the Smith v. McCormick opinion cited to by the majority. Clark, 958 F.2d at 858 n.5. The majority opinion in this case cites to the Smith opinion and claims that it "dictated" the result reached. Another panel of this Court has explicitly repudiated the Smith holding after Parker v. Dugger. This discrepancy cannot be left unresolved.[1]

Under the holding in Clark, if the state court states it has considered all evidence, a federal court must assume that the evidence was considered. Clark, 958 F.2d at 858-59, citing Parker, 111 S. Ct. at 736 ("We must

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1. The failure of the majority to recognize and resolve the conflict cannot be faulted to the Arizona Attorney General as Clark was specifically cited to the court as supplemental authority for the proposition proffered in this petition. (See "Notice of Supplemental Authority," filed Aug. 27, 1991.)

assume that the trial judge considered all this evidence before passing sentence. For one thing, he said he did."). In the instant case, the trial court specifically indicated he was considering "any possible mitigating circumstance." (R.T. of July 10, 1980, at 216.) Under Clark, that was all due process required him to do. See also Clemons v. Mississippi, 110 S. Ct. 1441, 1449 (1990). The majority holding on this point is inconsistent with Clark, Parker, and Clemons, and should be reversed.

The majority's holding regarding the Arizona Supreme Court's reweighing is also inconsistent with Clark and Richmond v. Lewis, 945 F.2d 1473 (9th Cir.1990). In Clark, on appeal the Arizona Supreme Court vacated one aggravating factor (grave risk of death) and modified another aggravating factor after it found no evidence to support a finding of cruelty in cruel, heinous and depraved. State v. Clark, 126 Ariz. 428, 435-36, 616 P.2d 888, 895-96, cert. denied, 449 U.S. 1067 (1980). Without discussing the mitigation in detail, the Arizona Supreme Court then stated, "From our independent review of the evidence in capital cases, we conclude that the aggravating circumstances described before have been established and the mitigating circumstances are not sufficiently substantial to call for leniency; therefore, the judgment and sentence are affirmed as to all counts." 126 Ariz. at 437, 616 P.2d at 897. This Court rejected Clark's claim that mitigation was not considered and affirmed. Clark, 958 F.2d at 858-59.

In Richmond, a majority of the Arizona Supreme Court vacated the cruel, heinous and depraved aggravating circumstance found by the trial court. Richmond v. Lewis, 948 F.2d 1473, 1485 n.9. The state supreme court, in its independent review, nonetheless affirmed the death sentence. State v. Richmond, 136 Ariz. 312, 320-21, 666 P.2d 57, 65-66 (1983).

This Court found no error. This Court noted that judges are "presumed to know the law and to apply it correctly in making their decisions." Richmond, 948 F.2d at 1484 (citing Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990)). This Court rejected Richmond's claim that the case should be returned for "plenary reweighing" where the record supports one or more aggravating circumstances and the court found "no mitigating circumstances sufficiently substantial to call for leniency." Richmond, 948 F.2d at 1489.

Under Richmond and Clark, a habeas court presumes the Arizona Supreme Court knows the law and correctly applied it in rendering its decision,[2] and assumes that all mitigation was considered in weighing aggravation and mitigation if the state court said it did. Both Richmond and Clark were decided after Smith, and neither panel felt compelled to find that Smith dictated a different conclusion.

The statements by the Arizona Supreme Court on independent review that it found no mitigating circumstances to warrant leniency was sufficient in Richmond and Clark. The majority opinion in this case holds that such language is not sufficient. The majority holding conflicts with the holdings of those courts, and the holding in Parker v. Dugger, 111 S. Ct. at 736. This Court should reverse the holding of the majority opinion.

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2. In Beam v. Paskett, 966 F.2d 1563 (9th Cir. 1992), another panel of this Court again reiterated that a habeas court presumes that a state appellate court has carried out its review obligations "even when [the court] does not expressly indicate in its opinion that it has done so." 966 F.2d at 1569.

B. The majority opinion violated a basic fundamental principle of habeas review by engaging in "plain error" review and reversing a state court sentence based on a claim not presented on appeal to this Court.

In the supplemental brief after remand from the United States Supreme Court, Jeffers raised six claims of error left to be resolved. Claim 1 was that the trial court "failed to consider all mitigating circumstances and failed to make appropriate findings." In this section of the brief, Jeffers challenged whether the trial court considered pretrial plea negotiations, sodium amytal testing, and the disparate treatment afforded Doris Van Der Veer. No where did Jeffers contend that the trial court failed to consider his intoxication evidence as "non-statutory." (Supplemental Brief at 2-10.) Jeffers did not cite to or argue from Smith v. McCormick in either the opening or reply supplemental briefs.

In claim 2, Jeffers claimed that under "Arizona law, Jeffers' case must be remanded to the trial court for a redetermination of the appropriate sentence under the Arizona death penalty statute." (Supplemental Brief at 17-18.) Jeffers did not make any claim that the Arizona Supreme Court failed to consider mitigation in its reweighing, only that because the Arizona Supreme Court found mitigation it was required under state law to remand. (Supplemental Brief at 11-18; Supplemental Reply Brief at 8.)

At oral argument, this Court raised on its own the issues of whether the trial court considered Jeffers' intoxication evidence as nonstatutory mitigation and the adequacy of the Arizona Supreme Court's opinion and reversed on that basis. The action of this Court is contrary to law, and must be reversed.

On habeas corpus review, federal courts cannot review the state court record for "plain error," the very action this Court took in this case. Engle

v. Isaac, 456 U.S. 107, 134-35 (1982); United States v. Frady, 456 U.S. 152, 165-66 (1982); Henderson v. Kibbe, 431 U.S. 145, 154 (1977). A "plain error" standard is inappropriate for habeas corpus review:

> Federal habeas challenges to state convictions . . . entail greater finality problems and special comity concerns. We remain convinced that the burden of justifying federal habeas relief for state prisoners is "greater than the showing required to establish plain error on direct appeal."

Engle, 456 U.S. at 134-35, quoting Henderson, 431 U.S. at 154. A collateral habeas challenge does not serve the same interest as a direct appeal. Frady, 456 U.S. at 165.

Applying a mere "plain error" standard on collateral review violates the State of Arizona's "strong interest in the finality of judgments." Henderson, 431 U.S. at 154 n.13. A state court's final judgment that a person is guilty of a crime and must be appropriately punished should "command respect":

> Once a defendant's chance to appeal has been waived or exhausted, . . . we are entitled to presume he stands fairly and finally convicted. . . . Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks.

Frady, 456 U.S. at 164-65.

Since 1983, when Jeffers first filed his petition for writ of habeas corpus, the state court judgments that he is guilty of first-degree murder have not commanded respect. The 9-year delay in the State of Arizona's ability to enforce its duly enacted criminal law diminishes the sovereignty of Arizona: "[T]he power of a state to pass laws means little if the state cannot enforce them" McClesky v. Zant, 111 S. Ct. 1454, 1469 (1991). Moreover, the extreme delay attendant on federal habeas review makes any

resentencing of a state prisoner very difficult, if not impossible. Henderson, 431 U.S. at 154 n.13. Because the reversal of a state prisioner's conviction or sentence on collateral review has serious consequences, a federal court must apply a standard of error higher than mere "plain error." This Court erred in applying the "plain error" standard to Jeffers' case and finding that Jeffers' death sentence should be reversed on grounds raised on its own.

The finality of the punishment imposed on Jeffers, death, does not change the standard to be used on review. Although the United States Constitution places special constraints on the procedures to convict and sentence capital defendants, once the trial stage of capital adjudication is completed, no different, especially stringent, procedures or laws apply on appeal or collateral review. Murray v. Giarratano, 492 U.S. 1, 8-9 (1989); Smith v. Murray, 477 U.S. 527, 538-39 (1986); Ford v. Wainwright, 477 U.S. 399, 425 (1986) (Powell, J., concurring in part). "[W]e have similarly refused to hold that the fact that a death sentence has been imposed requires a different standard of review in federal habeas corpus." Giarratano, 492 U.S. at 9. Because the standard that applies in non-capital cases applies equally to capital cases, and because this Court applied the incorrect "plain error" standard in reviewing Jeffers' case, this Court erred in setting aside Jeffers' death sentence on issues that Jeffers did

. . . .

. . . .

not present.[3] This Court should therefore grant rehearing.

C. This Court erred in reversing Jeffers' death sentence for the state court's failure to consider certain evidence as "nonstatutory" mitigation that Jeffers' never proffered or argued as nonstatutory mitigation, because state courts have no affirmative duty to examine the state court record sua sponte for mitigation.

This Court should reconsider its decision in this case because, in holding that the state courts failed to "carefully" consider evidence as "nonstatutory" mitigation when Jeffers never proffered or argued such, this Court has now imposed an "affirmative duty" on state courts to search the record for mitigation and to specify any and all potential mitigation, argued by the defendant or not. The United States Constitution does not support such a duty. The federal constitution requires that a state not prevent capital defendant from offering, or a state court from considering, any relevant evidence in mitigation. Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 608, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978). Nothing, however, requires a state court to affirmatively scour the record for mitigating evidence that the capital defendant does not offer or argue as mitigation.

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3. Jeffers' petition before the district court likewise did not contend that the trial court failed to consider his drug intoxication as "nonstatutory" or that the Arizona Supreme Court failed to consider mitigation in its independent reweighing. Jeffers v. Ricketts, 627 F. Supp. 1334, 1357-59 (D. Ariz. 1986). Therefore, Jeffers would have been precluded from raising these issues on appeal. Powell v. Spalding, 679 F.2d 163, 167 (9th Cir. 1982). Likewise, Jeffers never presented these claims in state court, therefore he was precluded from presenting it in a federal habeas corpus petition. 28 U.S.C. § 2254; Castille v. Peoples, 109 S. Ct. 1056, 1059-60 (1989).

No federal court, until the majority in this case, has imposed such a duty on state courts. Such a holding is contrary to that body of *constitutional* law finding that a capital defendant may waive presentation of mitigating evidence. Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 n.4 (1990); Singleton v. Lockhart, 962 F.2d 1315, 1321 (8th Cir. 1992).

Furthermore, the imposition of such a duty injects a quantum of "gamesmenship" into federal habeas review, a system already fraught with such practices. The majority's decision allows a capital defendant to "lie low" at sentencing by not offering or arguing any circumstances in mitigation, and then, upon appellate or collateral review, point out a single fact that the state trial court did not specifically note that it had considered in mitigation. Capital defendants can repeat this process after each new sentencing ad infinitum, delaying his day of reckoning. Such a holding is absurd and must be rejected.[4]

D. This Court's opinion materially misrepresented the position taken by the Arizona Attorney General on **Smith v. McCormick**.

In the majority opinion, this Court claims that the Arizona Attorney General "acknowledged that this case is 'on all fours' with Smith v. McCormick." Slip op. at 8. The point of law that this Court ascribed was that the trial court failed to consider mitigating evidence as nonstatutory after rejecting that it constituted statutory mitigation. A cursory review of the transcripts reveals the statement is incorrect. (See Transcripts of Oral Argument Attached as Appendix A.) At the oral argument, Judge Pregerson asked:

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4. For the reasons discussed below, such an "affirmative duty" holding also violates the Teague new rule prohibition.

CJJ: Well, this, this case, the posture of this case before us is pretty much on all fours with Smith versus McCormick, isn't it?

PM: Yes, your honor. I would say in the sense that the trial court did not specifically list the non-statutory mitigating circumstances. I would disagree with that analysis regarding what was considered because it was, I believe the trial court did properly consider that which was argued to him.

(Appendix A at 31.) Clearly, the only concession that Smith was "on all fours" with this case was limited to whether or not the trial court specifically listed all mitigating factors. The assistant attorney general conceded the trial court had not specifically detailed nonstatutory evidence, but argued that the court had considered the evidence. (Appendix A at 20.) In addressing how the Arizona Supreme Court viewed the evidence, the assistant attorney general specifically contended that the Arizona Supreme Court did consider the evidence as both statutory and nonstatutory. (Appendix A at 20-21.) Those portions of this Court's opinion that are based on a supposed concession by the Arizona Attorney General are simply wrong. The assistant attorney general specifically argued Smith was inconsistent with Clemons (Appendix A at 29-30); a new rule under Teague (id. at 30-31); and that Smith was complied with in this case. (Id. at 31.) This Court should reconsider its opinion on this point.

E. The proposition of law that a trial court or a state supreme court on independent review must state with specificity all nonstatutory mitigation, argued by the defendant or not, is clearly a new rule of law and its application in this case violates the principle of **Teague**.

As a threshold matter, a federal court always determines first if the relief the habeas corpus petitioner seeks would create a "new rule." Penry

v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 2944 (1989) (citing Teague v. Lane, 109 S. Ct. at 1069). A state prisoner seeking habeas corpus relief in federal court cannot benefit from a "new rule." Id. A "new rule" arises when the relief sought "breaks new ground or imposes a new obligation on the states." Penry, 109 S. Ct. at 2944; Teague, 109 S. Ct. at 1070. A "new rule" is imposed if "the result was not dictated by precedent" existing at the time the prisoner's conviction became final. Penry, 109 S. Ct. at 2944 (emphasis in original); Teague, 109 S. Ct. at 1070. The rationales for the "new rule" jurisprudence -- finality, predictability, and comity -- are undermined "to an equal degree by the invocation of a rule that was not dictated by precedent as by the application of an old rule in a manner that was not dictated by precedent." Stringer v. Black, __ U.S. __, 112 S. Ct. 1130, 1135 (1992); Butler v. McKellar, 494 U.S. 407, 110 S. Ct. 1212, 1214 (1990).

In addressing the Teague claim, this Court failed to apply various aspects of Teague. First, this Court does not "dictate" precedent to the Arizona Supreme Court concerning constitutional interpretation, therefore Smith cannot be used as mandating a procedure to the State of Arizona. See Stringer v. Black, 112 S. Ct. at 1140. Second, as other panels of this Court have specifically rejected the "teachings of Lockett and Eddings" as found in Smith, it is clear that those United States Supreme Court cases do not "dictate" that the Arizona Supreme Court was wrong in the instant case. Saffle v. Parks, 110 S. Ct. 1257, 1259-60 (1990); Butler, 110 S. Ct. at 1214; Greenawalt v. Ricketts, 943 F.2d 1020 (1991). Finally, the majority stated under Beam it was required to apply Smith in this case even if Smith was a new rule. Slip op. at 11 n.4. Such a holding is clearly in violation of Teague. Arizona cannot be bound by a case in which it was

not a party. Montana's failure to argue Teague may be a waiver in that case.[5] However, under Teague the inquiry is whether the Arizona courts correctly applied the existing law in the case sub nom, not whether Montana waived the claim in some other case. This Court should reconsider its opinion on this point also.

CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to reconsider its opinion and suggests that rehearing en banc is appropriate.

DATED this 12th day of September, 1992.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
Chief Counsel

Attorneys for RESPONDENTS-APPELLEES

---

5. See Collins v. Youngblood, 110 S. Ct. 2715, 2718 (1990).

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HC5-174

2196d/jd

[Dated March 19, 1993]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 86-1840

JIMMY WAYNE JEFFERS,	)	
	)	
PETITIONER-APPELLANT,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
-VS-	)	COURT FOR THE DISTRICT
	)	OF ARIZONA
SAMUEL A. LEWIS, ET AL.,	)	NO. CIV-85-945-TUC-ACM
	)	
RESPONDENTS-APPELLEES.	)	REQUEST FOR RULING
	)	

Respondents-Appellees hereby request that this Court rule on its petition for rehearing with suggestion for rehearing en banc.

DATED this 19th day of March, 1993.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
Chief Counsel

Attorneys for RESPONDENTS-APPELLEES

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner-appellant, a death row inmate in the Arizona State Prison, filed a petition for writ of habeas corpus in the United States District Court in December ***1983***. (CR 1.) On February 4, 1986, the district court dismissed the petition. *Jeffers v. Ricketts*, 627 F. Supp. 1334 (D. Ariz. 1986). In his opening brief in this Court, Petitioner raised five claims that his convictions were improper, and eight claims that his death sentence was improperly imposed. On November 9, ***1987***, a three-member panel of this Court rejected all of Petitioner's attacks on his conviction. *Jeffers v. Ricketts*, 832 F.2d 476, 479-81 (9th Cir. 1987). The panel also rejected Petitioner's claim that he was denied an impartial sentencing tribunal. *Id.* at 481-82. Two members of the panel, however, vacated Petitioner's death sentence on the ground that the "especially heinous or depraved" aggravating circumstance, while sufficiently narrow, could not be constitutionally applied to Petitioner "without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." *Id.* at 482-86. The panel declined to consider Petitioner's remaining sentencing-related claims, although in a footnote it stated that he was not entitled to a jury determination of aggravating and mitigating factors. *Id.* at 486 n.11. On April 14, 1989, this Court denied the State's motion for rehearing and suggestion for rehearing en banc.

The State then filed a petition for writ of certiorari asking the United States Supreme Court to review this Court's decision that the "especially heinous or depraved" aggravating circumstance could not be constitutionally applied to Petitioner. On October 10, ***1989***, the Supreme Court granted the petition. On June 27, ***1990***, the Supreme Court concluded that the state supreme court had adopted a sufficiently narrow

construction of the "especially heinous or depraved" circumstance, and that the circumstance was constitutionally applied in Petitioner's case. *Lewis v. Jeffers*, __ U.S. __, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). The Supreme Court vacated this Court's judgment and remanded for proceedings consistent with its opinion. *Id.* On October 1, ***1990***, the original panel of this Court invited supplemental briefs on the sentencing-related claims Petitioner had previously raised that had not been resolved. On January 28, ***1991***, the State submitted its supplemental answering brief. On July 24, ***1991***, this Court heard oral argument on the remaining claims.

On August 31, 1992, after the State had filed a writ of mandamus against the panel, the panel finally issued its opinion. *Jeffers v. Lewis*, ___ F.2d ___ (9th Cir. 1992). On September 14, 1992, Respondents-Appellees filed pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, a petition for rehearing with suggestion for rehearing en banc. The panel, only after being prodded by the filing of a request for ruling, ordered the inmate to file a response on November 25, 1992. On December 15, 1992, the inmate filed his response to the petition for rehearing/suggestion for rehearing en banc. It has now been over 90 days since the response was filed.

The United States Supreme Court in *In re Blodgette*, specifically stated that it was the duty upon the federal courts to "take all steps necessary to insure a prompt resolution" of a federal habeas corpus petition in a capital case. 112 S. Ct. 674, 676, 116 L. Ed. 2d 669, 671 (1992). The State of Arizona believes that 90 days is more than sufficient for this Court to review and rule on the petition for rehearing. The State of Arizona respectfully requests that this Court rule on the petition for rehearing with

suggestion for rehearing en banc.

DATED this 19th day of March, 1993.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
Chief Counsel

Attorneys for RESPONDENTS-APPELLEES

CERTIFICATE OF SERVICE

TWO COPIES of this Request were deposited for mailing March 19, 1993, to:

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HC5-174
hc5174.pl2

[Dated March 31, 1993]

Office of the Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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March 31, 1993

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John P. Frank, Esq.
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Phoenix, AZ 85003-1899

Re: Jeffers v. Lewis, No. 86-1840 (Death Penalty Case)

Dear Counsel:

In response to appellees' Request for Ruling, the panel has advised that the petition for rehearing presents issues that require in-depth analysis. The panel is well along in its consideration of these issues and expects to act on the petition by the end of April.

Sincerely,

/S/

Jereldine Curtis

Senior Deputy Clerk

[Filed October 1, 1990]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIMMY WAYNE JEFFERS,	)	
	)	
Petitioner-Appellant,	)	
	)	CA No. 86-1840
-vs-	)	
	)	
JAMES R. RICKETTS et al.,	)	ORDER
	)	
Respondents-Appellees.	)	
	)	

BEFORE: PREGERSON AND CANBY, CIRCUIT JUDGES AND WILSON* DISTRICT JUDGE.

Appellant is invited to submit a supplemental brief addressing those issues relating to his sentence that were previously raised in this court but not resolved by this court's decision, reported at 832 F.2d 476, nor by the decision of the Supreme Court in Lewis v. Jeffers, 110 S. Ct. 3092 (1990). Appellant's supplemental brief shall not exceed thirty-five (35) pages, and shall be filed within forty-five days of the filing of this order.

Respondents may file a responsive supplemental brief not exceeding thirty-five (35) pages within 30 days after service of appellant's supplemental brief.

Appellant may file a supplemental reply brief not exceeding fifteen (15) pages within fourteen (14) days of service of respondents' supplemental brief.

* The Honorable Stephen V. Wilson, United States District Judge for the Central District of California, sitting by designation.

[Dated January 29, 1992]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 86-1840

JIMMY WAYNE JEFFERS,	)	
	)	
Petitioner-Appellant,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
-vs-	)	COURT FOR THE DISTRICT
	)	OF ARIZONA
SAMUEL A. LEWIS, et al.,	)	NO. CIV-85-945-TUC-ACM
	)	
Respondents-Appellees.	)	REQUEST FOR RULING
	)	

Respondents submit the following Request for Ruling.

DATED this 29th day of January, 1992.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
Chief Counsel

Attorneys for RESPONDENTS-APPELLEES

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner-appellant, a death row inmate in the Arizona State State Prison, filed a petition for writ of habeas corpus in the United States District Court in December 1983. (CR 1.) On February 4, 1986, the district court dismissed the petition. Jeffers v. Ricketts, 627 F. Supp. 1334 (D. Ariz. 1986). In his opening brief in this Court, petitioner raised five claims that his convictions were improper, and eight claims that his death sentence was improperly imposed. On November 9, 1987, a three-member panel of this Court rejected all of petitioner's attacks on his conviction. Jeffers v. Ricketts, 832 F.2d 476, 479-81 (9th Cir. 1987). The panel also rejected petitioner's claim that he was denied an impartial sentencing tribunal. Id. at 481-82. Two members of the panel, however, vacated petitioner's death sentence on the ground that the "especially heinous or depraved" aggravating circumstance, while sufficiently narrow, could not be constitutionally applied to petitioner "without losing its ability to distinguish in a principled manner between those it condemns to death and those it does not." Id. at 482-86. The panel declined to consider petitioner's remaining sentencing-related claims, although in a footnote it stated that he was not entitled to a jury determination of aggravating and mitigating factors. Id. at 486 n.11. On April 14, 1989, this Court denied the state's motion for rehearing and suggestion for rehearing en banc.

The state then filed a petition for writ of certiorari asking the United States Supreme Court to review this Court's decision that the "especially heinous or depraved" aggravating circumstance could not be constitutionally applied to petitioner. On October 10, 1989, the Supreme Court granted the petition. On June 27, 1990, the Supreme Court concluded that the state supreme court had adopted a sufficiently narrow

construction of the "especially heinous or depraved" circumstance, and that the circumstance was constitutionally applied in petitioner's case. Lewis v. Jeffers, __ U.S. __, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990). The Supreme Court vacated this Court's judgment and remanded for proceedings consistent with its opinion. Id. On October 1, 1990, this Court invited supplemental briefs on the sentencing-related claims petitioner had previously raised in this Court that were not resolved by this Court's decision nor by the Supreme Court's decision. On January 28, 1991, the state submitted its supplemental answering brief per this Court's order. On July 24, 1991, this Court heard oral argument on the remaining claims.

It has now been 6 months since the matter was submitted to the Court. Respondents-appellees would note for the Court that it has been over 9 years since petitioner originally filed his petition for writ of habeas corpus in the United States District Court. It has been over 18 months since the United States Supreme Court remanded the case to this Court for proceedings consistent with the high court's opinion. Respondents believe that further delay is unwarranted and that this Court should issue its opinion.

In re Blodgett, 1992 U.S. Lexis 193 (U.S., Jan. 13, 1992), the United States Supreme Court held:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty to take all steps necessary to ensure a prompt resolution of the matter, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

Id. at 6-7 (emphasis added). Given the extreme length of time petitioner-appellant's case has been pending in the federal system, the state

believes that the federal courts have failed in their "concomitant duty to take all steps necessary to ensure a prompt resolution of the matter." In re Blodgett, at 6. The state further believes that the 6 months in which this Court has had to decide the remaining few issues in this case is more than sufficient to exercise its "duty to give full and fair consideration to all of the issues." Id. at 7. The state believes any additional delay is a violation of the comity that exists between the federal and the state systems. Therefore, the State of Arizona respectfully requests that this Court exercise all due diligence and render its opinion.

DATED this 29th day of January, 1992.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
Chief Counsel

Attorneys for RESPONDENTS-APPELLEES

CERTIFICATE OF SERVICE

TWO COPIES of this Motion have been deposited for mailing this 29th day of January, 1992, to:

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HC5-174
9939D jd

[Dated November 16, 1992]

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 86-1840

JIMMY WAYNE JEFFERS,	)	
	)	
Petitioner-Appellant,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
-vs-	)	COURT FOR THE DISTRICT
	)	OF ARIZONA
SAMUEL A. LEWIS, et al.,	)	NO. CIV-85-945-TUC-ACM
	)	
Respondents-Appellees.	)	REQUEST FOR RULING
	)	

Respondents-Appellees hereby request that this Court rule on its petition for rehearing with suggestion for rehearing en banc.

DATED this 16th day of November, 1992.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
Chief Counsel

Attorneys for RESPONDENTS-APPELLEES

MEMORANDUM OF POINTS AND AUTHORITIES

On September 14, 1992, Respondents-Appellees filed pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, a petition for rehearing with suggestion for rehearing en banc. Sixty days have now elapsed since the timely filing of the State's petition for rehearing and this Court has failed to either request that a responsive pleading be filed or deny the petition. The United States Supreme Court in In re Blodgette, specifically stated that it was the duty upon the federal courts to "take all steps necessary to insure a prompt resolution" of a federal habeas corpus petition in a capital case. 112 S. Ct 674, 676, 116 L. Ed. 2d 669, 671 (1992). The State of Arizona believes that 60 days is more than sufficient for this Court to review the petition for rehearing to determine if a responsive pleading is required or to deny the petition. The State of Arizona respectfully requests that this Court rule on the petition for rehearing with suggestion for rehearing en banc.

DATED this 16th day of November, 1992.

Respectfully submitted,

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
Chief Counsel

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